73-1367

IN THE

Supreme Court of the United States

NO.——

UNITED STATES OF AMERICA, ex rel SAM ADAM,

Petitioner,

vs.

HONORABLE RICHARD ELROD, Sheriff of Cook County, Illinois,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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INDEX

	Page
OPINION BELOW	1
JURISDICTION	2
QUESTIONS PRESENTED	2
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE WRIT	6
CONCLUSION	8
APPENDIX	1A

Citations

Johnson vs. *Zerbst*, 304 U.S. 458	7
Russo and Ellsberg vs. *Byrne*, 93 S. Ct. 21	6
Timken Roller Bearing Co. vs. *United States*, 38 F.R.D. 57 (Ohio D.C., 1964)	6

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Petitioner, SAM ADAM, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered December 28, 1973.

OPINION BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit, No. 73-1407, 73-1722, —— F. 2d —— (7th Cir. 1973), appears in the Appendix hereto.

JURISDICTION

The judgment of the United States Court of Appeals for the Seventh Circuit was entered on December 28, 1973. A timely petition for rehearing was denied on January 31, 1974, and this petition for certiorari is filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C., Sec. 1254 (1).

QUESTION PRESENTED

MAY A LAWYER PROPERLY INVOKE HIS CLIENT'S ATTORNEY-CLIENT PRIVILEGE WHEN HE IS CALLED TO TESTIFY BEFORE A GRAND JURY, WHERE THE CLIENT HAS PREVIOUSLY TESTIFIED BEFORE THE SAME GRAND JURY, AND WHERE A TRANSCRIPT OF SAID CLIENT'S TESTIMONY IS NOT MADE AVAILABLE EITHER TO THE LAWYER OR THE COURT.

STATEMENT OF THE CASE

Petitioner is a member in good standing of the bar of this Honorable Court. He has been adjudged in contempt for refusal to answer three questions concerning his client, one Shirley Walker, before the Cook County, Illinois, Grand Jury. Petitioner's refusal to answer was predicated upon the attorney-client privilege in conjunction with the Fourth, Sixth, and Fourteenth Amendments to the United States Constitution. Petitioner specifically has disavowed any fear of self-incriminaion.

The facts arose as follows: Shirley Walker, an admitted prostitute and narcotics addict was charged with murder and incarcerated in jail. While there, and without bene-

fit of counsel, she was prevailed upon by the police and the State's Attorney to sign a statement implicating four others in the murder. These four were thereupon arrested and Miss Walker was taken from the jail to a motel.

At her first opportunity, however, Miss Walker escaped, immediately contacted the lawyer (not petitioner) for one of the four she had implicated, and disavowed her statement as a fabrication. When the State's Attorney learned of Miss Walker's turnabout she was subpoenaed before the Grand Jury. It was at this point that she retained petitioner as her counsel.

At first, Miss Walker refused to answer any questions before the Grand Jury, but after the Assistant State's Attorney assured the Court that "nothing will in any way incriminate her", she answered all questions put to her about the murder. Later the same day, however, another Assistant State's Attorney revealed to a different judge that the true purpose in subpoenaing Miss Walker was in order to compel her to incriminate herself with respect to possible charges of perjury and obstruction of justice. The next day, when the State's perfidy was revealed, the State's position changed again and the State informed the Court that in fact the subject of the Grand Jury investigation was a Chicago police officer.

Subsequent to this representation, Miss Walker was granted immunity, but when she attempted to inform the Grand Jury about corrupt practices within the Chicago Police Department, the State's Attorney changed the direction of examination to the circumstances under which she had obtained her counsel (Petitioner herein) and her communications with him.

After Miss Walker supposedly answered these questions, Petitioner was called before the same Grand Jury. Petitioner refused to answer questions concerning his communications with his client, and the circumstances under which she became his client. Petitioner's refusal was based upon the State's obvious harassment of Miss Walker (and incidentally Petitioner), that no purpose for the inquiry of Petitioner had been stated, and that the constitutionally protected attorney-client privilege was at stake.

Petitioner specifically disavowed any personal Fifth Amendment claim and in fact invited the State's Attorney to ask Petitioner any questions about himself.

Petitioner was thereupon taken before the Court, adjudged in contempt and sentenced to ten days incarceration. The contempt related to his refusal to answer the following questions:

> 1) When did you become the lawyer for Shirley Walker?
>
> 2) Would you tell the Ladies and Gentlemen of the Grand Jury the circumstances surrounding your employment as Shirley Walker's lawyer?
>
> 3) I now ask you, Mr. Adam, to inform this Grand Jury as to that conversation that took place between you and Miss Walker and Mr. Pincham on Tuesday morning, September 28, 1971, as you were enroute here to the Criminal Courts Building in Mr. Pincham's car?

Bail was granted and on appeal the Supreme Court of Illinois affirmed as to two questions and reversed and remanded as to question (2). As to questions (1) and (3), the Court held that Miss Walker had waived the attorney-client privilege by testifying prior to Petitioner. 51 Ill. 2d 46, 280 N.E. 2d 205.

In order to demonstrate that Miss Walker did not in fact waive the attorney-client privilege, Petitioner moved that her Grand Jury testimony be made available either to Petitioner or to the Illinois Supreme Court *in camera*. The motion was denied.

Petitioner then filed a petition for a Writ of Habeas Corpus in the United States District Court for the Northern District of Illinois. The District Court dismissed the Petition, stating that of the two remaining questions, question (1) was not within the scope of the privilege. (Oral opinion).

Cross-appeals were then taken to the United States Court of Appeals for the Seventh Circuit. The Seventh Circuit reversed the District Court as to its holding that question (2) was privileged and affirmed as to the holding that question (1) was not privileged. Petitioner thus remains liable for contempt on both questions.

Petitioner's request for personal or Court perusal of the Grand Jury transcript of Shirley Walker's testimony was repeated to the District Court and to the Seventh Circuit. These requests were denied.

REASONS FOR GRANTING THE WRIT

THE DECISION BELOW VIOLATES THE FOURTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

The United States Court of Appeals for the Seventh Circuit, as did the Illinois Supreme Court prior thereto, concluded that Miss Walker, by testifying, effectively waived the attorney-client privilege upon which Petitioner based his refusal to answer the questions pertinent to the instant case. No one, however, except the State's Attorney, has seen Miss Walker's testimony.

It is the Petitioner's contention that without having had the opportunity to peruse a transcript of his client's testimony, he could not be sure to an ethical certainty, of the scope or the precise substance of the examination to which his client responded. Aware that only a client can unseal his attorney's lips, *Timken Roller Bearing Co.* vs. *United States,* 38 F.R.D. 57 (D.C. Ohio, 1964), Petitioner was not satisfied that there had been a waiver.

For the same reason of non-production of the Walker testimony transcript, neither the Illinois Supreme Court nor the Seventh Circuit could reasonably conclude that there had been a waiver. What is involved here is not a mere evidentiary doctrine, but a privilege which is constitutionally protected. Justice Douglas, sitting as a circuit judge in a recent case, stated:

> "The constitutional right earnestly pressed here is the right of counsel guaranteed by the Sixth Amendment. That guarantee obviously involves the right to keep the confidences of the client from the ear of the Government which these days seeks to learn more and more of the affairs of men." *Russo and Ellsberg* vs. *Byrne,* 93 S. Ct. 21, 22.

As such, this Honorable Court's holding in *Johnson* vs. *Zerbst,* 304 U.S. 458, 58 S. Ct. 1019 (1938), is pertinent. It was stated there that courts "indulge every reasonable presumption against waiver of fundamental constitutional rights and we do not presume acquiescence in the loss of fundamental rights. A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege." 304 U.S. at 464, 58 S. Ct. at 1023.

Without the advice of the petitioner that Miss Walker assert the privilege, without the transcript of her testimony, and where Miss Walker was testifying under subpoena and a grant of immunity, it is an unreasonable and degrading treatment of her rights to speculate that she voluntarily and knowingly waived those rights. It is equally unreasonable to conclude that her attorney, Petitioner, should have presumed her waiver, as have the Courts below.

The Court of Appeals also held that the question: "When did you become the lawyer for Shirley Walker?", was not of the nature of those areas encompassed by the attorney-client privilege. The Court held that such a question was within the category relating to identity and existence of the attorney-client relationship, and not pertaining to 'communications.'

The Petitioner submits that in the circumstances of this case, involving possible harassment of client and attorney, questionable motives of the State's Attorney, and non-disclosure of the client's testimony, even the date of Miss Walker's retention of Petitioner as a lawyer may be privileged. Petitioner simply wanted to know the precise scope of Miss Walker's testimony before testifying beyond the identity of his client. Again, the production

of the transcript is necessary to conclude even that the question of "when" does not involve the privilege.

CONCLUSION

To resolve these important questions of clearly constitutional dimensions, Petitioner prays that the Court grant the instant petition for writ of certiorari and reverse the judgment and conviction below. In the alternative, Petitioner prays that this Court reverse and remand for an evidentiary hearing, including, but not necessarily limited to, an examination of the transcript of Shirley Walker's testimony before the Grand Jury.

Respectfully prayed and submitted,

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Attorney for Petitioner.

APPENDIX

UNITED STATES COURT OF APPEALS

For the Seventh Circuit
Chicago, Illinois 60604
Argued November 2, 1973
December 28, 1973

Before

Hon. LUTHER M. SWYGERT, Chief Judge
Hon. JOHN S. HASTINGS, Senior Circuit Judge
Hon. WILBUR F. PELL, JR., Circuit Judge

UNITED STATES OF AMERICA ex rel. SAM ADAM, *Petitioner,*	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
Nos. 73-1407, 73-1722	
vs.	
HONORABLE RICHARD ELROD, Sheriff of Cook County, Illinois, *Respondent.*	No. 72 C 2853 James B. Parsons, *Judge.*

This is an appeal by both parties from the district court's decision as to whether the answers to certain proposed questions at a grand jury proceeding were encompassed by the attorney-client privilege. Petitioner Sam Adam was the attorney representing one Shirley Walker

when the latter was subpoenaed to testify before the Cook County grand jury. Adam was later called to testify before the same grand jury, at which time he refused to answer the following questions on the ground that the information sought was protected from disclosure by the attorney-client privilege:

> (1) When did you become the lawyer for Shirley Walker?
>
> (2) Would you tell the Ladies and Gentlemen of the Grand Jury the circumstances surrounding your employment as Shirley Walker's lawyer?
>
> (3) I now ask you, Mr. Adam, to inform this Grand Jury as to that conversation that took place between you and Miss Walker and Mr. Pincham on Tuesday morning, September 28, 1971, as you were enroute here to the Criminal Court's Building in Mr. Pincham's car?

Adam was ordered to answer these questions by the state circuit court but he again refused. The circuit court found the refusal to answer to be contemptuous and imposed sentence.

Adam appealed directly to the Illinois Supreme Court.[1] That court affirmed the circuit court's order as to the questions 1 and 3. With regard to the second question, the Illinois Supreme Court found the record inadequate to determine whether there had been a waiver of the privilege by Miss Walker. The circuit court's judgment as to question 2 was, therefore, reversed and remanded to the trial court for further proceedings. *People* v. *Adam*, 51 Ill. 2d 46, 280 N.E. 2d 205, *cert. denied*, 409 U.S. 948 (1972).

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1. An original action in habeas corpus was consolidated with that appeal.

Adam then filed a petition for a Writ of Habeas Corpus in the district court. The district court dismissed the petition, stating that question 1 was not within the attorney-client privilege,[2] although question 3 was privileged. The state appeals from the district court's ruling as to question 3 and Adam cross-appeals on the court's ruling on question 1.

Question 1

The attorney-client privilege is generally limited to communications between the client and attorney. The privilege thus does not extend to the fact that the attorney-client relationship has arisen, the identity of the client, or the date when the relationship began, since these matters involve no disclosure of communications.

> "[A]lthough the word 'communications' must be broadly interpreted in this context, see 8 Wigmore, Evidence § 2306 (McNaughton rev. 1961), the authorities are clear that the privilege extends essentially only to the substance of matters communicated to an attorney in professional confidence. Thus the identity of a client, or the fact that a given individual has become a client are matters which an attorney normally may not refuse to disclose, even though the fact of having retained counsel may be used as evidence against the client." *Colton* v. *United States*, 306 F. 2d 633, 637 (2d Cir. 1962), *cert. denied*, 371 U.S. 951 (1963).

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2. The district court also ruled that question 2 was not within the scope of the attorney-client privilege. Both parties, however, expressly agreed in oral argument before this court that no appeal was being taken with respect to the second question as it was not properly before the federal courts.

> "Those questions which pertain to the *date* and general nature of the legal services performed by the [attorney] for [the client] should be answered as they do not call for any confidential communication." *Id.* at 636. (Emphasis added.)

See also, *In re Semiel*, 411 F. 2d 195, 197 (3d Cir. 1969), *cert. denied*, 396 U.S. 905; *National Union Fire Ins. Co.* v. *Aetna Casualty & Surety Co.*, 384 F. 2d 316, 317 n.4 (D.C. Cir. 1967); *United States* v. *Kendrick*, 331 F. 2d 110, 113-14 (4th Cir. 1964).

The question, "When did you become the lawyer for Shirley Walker?" merely required that Adam disclose a date. Adam was not asked by this question to reveal any matter communicated to him by his client. As the district court noted:

> "[I]t is simple logic which compels me to find and hold, as I now do, that the date, place and identifying circumstances of the establishment of a lawyer-client relationship is innocent and highly relevant to the issue of whether or not there existed such a relationship at all in the first place." *United States ex rel. Adam* v. *Elrod*, No. 72 C 2853 (N.D. Ill., filed Feb. 26, 1973) (oral opinion).

We agree with the district court that a question which simply asked for the date upon which the attorney was retained by the client was not encompassed by the attorney-client privilege. Adam, therefore, could not properly claim the protection of the privilege.

Question 3

Determining whether the information sought by the third question is privileged is less easy of resolution. The state contends that the conversation referred to in the question is not privileged since Mr. Pincham, a third

person, was present during the conversation. We agree that generally the presence of a third party who is not the agent of either the attorney or the client destroys the privilege. 8 Wigmore, Evidence § 2311. (McNaughton rev. 1961).

Adam contends, however, that the particular circumstances of the present case should place it within an exception to this general rule. Mr. Pincham was not, Adam argues, an adverse, or even disinterested third party. Instead, he argues, Mr. Pincham was the attorney who, although not representing Miss Walker, had referred her to Adam. In addition, Mr. Pincham had worked with Adam on a number of cases. The crucial test, it is argued, for determining whether a third person's presence destroys the privilege, is whether the circumstances, viewed as a whole, imply that the conversation between the client, the attorney, and the third person was intended to be confidential. The district court, adopting this reasoning, held the answer to the third question to be privileged:

> "[T]he attorney-client privilege in criminal cases is not to be narrowly construed but broadly construed, so broadly construed that it does not adopt the corollary that disclosure to a third party necessarily eliminates the confidential nature of the correspondence between attorney and client. . . . In many instances it would not . . . . [T]he nature of [the] confidentiality here may in fact have involved Mr. Pincham to the extent that he, too, even though not in fact the retained counsel, has an interest in Shirley Walker; if nothing else, then the interest comes from being a colleague or associate of her attorney, or interest with relation to other parties involved in the litigation. . . ." *United States ex rel. Adam* v. *Elrod*, No. 72 C 2853 (N.D. Ill., filed Feb. 26, 1973) (Oral opinion).

It is not difficult to conceive of factual situations in which the confidentiality premise upon which the privilege is based would not be destroyed by the presence of one or several persons other than the lawyer to whom the communication was being made. The difficulty here is that of ascertaining just what the intertwining relationship of Attorney Pincham was to Miss Walker during the conversation in the automobile. While it might be guessed that Mr. Pincham was present in some capacity to do with Miss Walker's legal interests other than that of chauffeur, a guess even though an educated one is not a substitute for record facts. Petitioner's brief in this court states: "It was on the advice of Mr. Pincham, that Miss Walker retained the Petitioner as counsel." No record citation, however, is given.

We need not, however, speculate on whether there was a sufficient basis for finding the privilege inviolate notwithstanding the presence of Attorney Pincham. Instead, we, as did the Illinois Supreme Court, will assume *arguendo* that the privilege was not destroyed. Upon so doing we also agree with that court that the privilege was waived.[3]

Adam contends that this decision of the Illinois Supreme Court is erroneous since it overlooks the fact that he had never been allowed to read the transcript of Miss Walker's testimony at the grand jury. Without reading the transcript, it is argued, Adam could not know

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3. We note that the district court did not, after finding the conversation to be privileged, expressly determine whether this privilege had been waived by Miss Walker.

what his client had said and, therefore, there was no effective waiver of the privilege. This argument is without merit. Miss Walker's testimony as to the substance of her conversation with Adam waived her attorney-client privilege with respect to this communication. *United States* v. *Cote,* 456 F. 2d 142, 144-45 (8th Cir. 1972); 8 Wigmore, Evidence § 2327 (McNaughton rev. 1961); McCormick, Evidence § 93 (2d ed. 1972). What she answered and whether her answer was truthful are irrelevant to the question of waiver. Equally irrelevant is the fact, as possibly it might be inferred, that Adam did not desire to testify in such a manner as to contradict any of the testimony of his client, Miss Walker. While such concern for the client's welfare may be laudable it does not reflect upon whether she waived the privilege, which is her privilege and not that of the lawyer. The crucial fact is that Miss Walker did testify concerning the conversation, thereby waiving any privilege which might have been attached thereto.

Adam next contends that the Illinois Supreme Court's ruling on waiver was without foundation since that court did not read the grand jury transcript to determine that Miss Walker had, in fact, been asked and answered the exact questions put to Adam. In Adam's brief to the Illinois Supreme Court, however, he stated that Miss Walker had answered the very questions he was later asked.[4]

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4. The following statements appeared in Adam's brief to the Illinois Supreme Court:

> "Shirley Walker testified before the Grand Jury that she knew of and had heard about Attorney Sam Adam. . . . She telephonically conferenced with Mr. Adam at his office [on September 27, 1971] and

Under Illinois law, matters admitted by a party in his brief may be considered to be true. *Chance* v. *Kimbrell*, 376 Ill. 615, 617, 35 N.E. 2d 48, 49 (1941). Thus, in considering this case, the Illinois Supreme Court noted:

> "The record before us does not contain the testimony of Shirley Walker before the grand jury. [Adam's] brief, however, states that in her testimony she told the grand jury when she employed [Adam] and also related the conversations held with [Adam] in Pincham's car while enroute from the latter's home to the Criminal Courts Building. It is also stated in [Adam's] brief that while she testified before the grand jury [Adam] waited outside the grand jury

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was told by him to meet him at Attorney Pincham's home the following morning. She testified that she did so, and that she and Attorneys Adam and Pincham rode from the latter's home in his car to the Criminal Court Building. She was asked and she told the Grand Jury the conversations that were had in the car en route to the Criminal Court Building. She answered all questions put to her on her attorney-client relationship and on all her conferences and conversations with her attorney, Sam Adam. . . . Attorney Sam Adam counseled with Shirley Walker immediately outside the Grand Jury room during her Grand Jury testimony. . . . Assistant State's Attorney DiVito asked Attorney Sam Adam about his attorney-client relationship with Shirley Walker, the facts and circumstances of him becoming her attorney, his meeting with her at Attorney Pincham's home, their coming to the Criminal Court Building together, and the conversations in the car en route to the Criminal Court Building, (R. 36), *the very same questions which had been asked of and answered by Shirley Walker.*" Brief for Defendant-Appellant at 20-21, in *People* v. *Adam*, 51 Ill. 2d 46, 280 N.E. 2d 205 (1972) (Emphasis added.)

room and that she repeatedly left the grand jury room and conferred with [Adam]. . . . Under the circumstances shown we need not and do not decide whether the answers to the first and third questions are privileged, because, if so, the privilege was waived." *People* v. *Adam*, 51 Ill. 2d 46, 48-49, 280 N.E. 2d 205, 207 (1972).[5]

The Illinois practice of considering admissions of a party in his brief as true is not so fundamentally unfair as to constitute a denial of due process, and, therefore, the procedure is not the proper subject of review in a federal habeas corpus proceeding. *United States ex rel. McCray* v. *Rundle*, 422 F. 2d 354, 356 (3d Cir. 1970).

In sum, we agree with the Illinois Supreme Court that, even if the answer to question 3 was privileged (a matter which we assumed *arguendo* but did not decide), that privilege was waived when Miss Walker testified as to the substance of the conversation involved. The fact that, procedurally, the Illinois Supreme Court arrived at this decision partly on the basis of admissions in Adam's brief to that court is not properly reviewable by this court in a habeas corpus proceeding.

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5. We note that the Illinois Supreme Court found that any privilege attached to question 1, as well as to question 3, had been waived by Miss Walker in answering these questions at the grand jury. However, since we found that the information sought by question 1 was clearly not covered by the attorney-client privilege, we do not deem it necessary to consider the waiver issue with respect to the first question.

For the reasons hereinbefore set out, the decision of the district court is affirmed as to Question 1 and reversed as to Question 3.[6]

AFIRMED IN PART; REVERSED IN PART

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6. The foregoing decisional disposition of this case was based upon the posture of the case as presented to us by the parties in their briefs and oral arguments. Subsequent to the preparation of the foregoing order but prior to its release we have noted aspects of the case which cause us to question what the exact status of the proceedings in the district court is.

While both parties purported to appeal from action of the district court, neither party in his brief refers to an appeal from a judgment of the district court but rather each requests that we affirm or reverse a "ruling" of the court, a judicial bird of somewhat uncertain status insofar as it accords appellate jurisdiction.

The civil docket maintained in the office of the clerk of the district court does not throw much additional illumination on the subject. We note the following entries: "2-26-73: Respondent's motion to dismiss, is allowed. The Petition for writ of habeas corpus herein, is ordered dismissed.

"3-8-73: Filed respondent's Notice of Appeal.

"3-27-73: Filed Petitioner's Notice of Appeal.

"3-23-73: Filed Petitioner's Motion Requesting Issuance of Certificate of Probable Cause.

"3-23-73: This cause coming before this Honorable Court, after the denial of petitioner's application for a writ of habeas corpus, and pursuant to petitioner's motion for issuance of a certificate of probable cause; This court hereby finds that the petition for a writ of heabeas [sic] corpus contains a substantial federal question and, therefore, issues a certificate of probable cause, in the instatant [sic] cause.

"3-30-73: It is hereby ordered that the parties in the case of People of the State of Illinois v. Sam Adam, No. 71 A 35, now pending in the Circuit Court of Cook County are hereby stayed from proceedings in said case for a period of 20 days.

"5-7-73: It is hereby ordered that the parties in the case of People vs. Sam Adam, No. 71 A 35, now pending in the Circuit Court of Cook County are hereby stayed from proceedings in said case for a period of 10 additional days from date hereof."

In the appendix filed with this appeal no final judgment is set forth but the last item in the appendix is a transcript of proceedings in the district court on February 26, 1973. This item was an extended colloquy in which the court announced, *inter alia*, its determination of the issue before it.

The following passages are noted:

> "For all the matters above expressed, but for the very limited purposes above stated, the motion of the respondent should be, and the same hereby is, allowed. The petition is dismissed and subject to the supplemental matters, the cause before me is closed.
>
> • • •
>
> "As to the third question, it is my finding as I have said, that that question in the circumstances under which I saw it, I viewed it, ought not have been asked and, therefore, need not have been answered.
>
> • • •
>
> "Well, gentlemen, I have read my decision in the record. I have entered my final order. I will enter a supplemental order staying — what is it — just a stay order?
>
> • • •
>
> "THE COURT: That is a supplemental order. I have a final order allowing your [respondent's] motion to dismiss. I have a finding that one of the ques-

tions he was correct in not answering, the disclosure of the conversation; as to the two questions, that they were basic and harmless and should have been answered.

• • •

"MR. ADAM: The Supreme Court of Illinois affirmed as to two but reversed one question. Now you have ruled that one of the questions should have been answered and one should not have been answered so —

• • •

"MR. ADAM: As to those two questions they said my refusal to answer those two questions was unjustified.

"THE COURT: Well, I differ with them.

"MR. ADAM: I know you do, on one of the two.

"THE COURT: The most important question is the question of your conversation with your client. I differ that the lawyer-client privilege is that narrowly handled in criminal cases."

In sum, we appear to have what purports to be a final disposition in that the motion of the respondent to dismiss was "allowed" without qualification. Yet the court in colloquy appears to have ruled with the petitioner as to one of the challenged questions. Notwithstanding references in the colloquy to finality, the court proceeded to grant stays subsequent to the filing of notices of appeal.

To resolve the apparently questionable status of the appellate proceedings and to move the litigation on its course, we therefore hold that if a final appealable judgment has been entered in the district court the foregoing order will stand as written. If, as it could be argued, there was a final judgment but that judgment was a sustaining of the motion to dismiss the petition in toto (which would scarcely seem to reflect the district court's thinking) then the judgment is affirmed.

If, on the other hand, there is no final judgment then we will treat the matter as an interlocutory order below. On that basis, we note that the district court did grant a certificate of probable cause on the basis that there was a substantial federal question. (It, of course, was not necessary for the representative of the state to secure a certificate of probable cause).* While not in strict compliance with the guidelines laid down in 28 U.S.C. § 1291(b), we think there is sufficient compliance with that subsection that we will handle the matter thereunder, entertain the appeal and upon so doing enter the foregoing opinion as to the law and remand for further proceedings in accordance therewith.

* Rule 22(b), Federal Rules of Appellate Procedure.